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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY,

Appellant

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees

On Appeal From the United States District Court for the Southern District of New York

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JURISDICTIONAL STATEMENT AND BRIEF

Appellant CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY (sometimes hereinafter referred to as "C&EI") appeals from the judgment of the United States District Court for the Southern District of New York, entered on October 4, 1966 in No. 66 Civ. 2860, *Erie - Lackawanna Railroad Company et al. v. United States et al.* (in which appellant was an intervening plaintiff), denying motions for interlocutory injunction to enjoin the enforcement, operation and execution of certain orders of the Interstate Commerce Commission, and submits this Statement and Brief to show that the Supreme Court of the United States has jurisdiction of the appeal, that substantial questions are presented,

and that the Court below erred in denying appellant's motion for interlocutory injunction.

OPINION BELOW

The majority and dissenting opinions of the three-judge United States District Court for the Southern District of New York are not yet reported. They are at pages 1685-1761 of the record on appeal and are attached as Appendix "A" to the Jurisdictional Statement of *Baltimore & Ohio Railroad Company, et al. v. United States of America, et al.*, No. 642, October Term, 1966. The Report and Order of the Interstate Commerce Commission, dated April 6, 1966, are at pages 971 to 1064 of the record on appeal and are reported at 327 I.C.C. 475. The Report and Order of the Interstate Commerce Commission on Reconsideration, dated September 16, 1966, are not yet reported. A copy is attached as Appendix "B" to the Jurisdictional Statement in *Baltimore & Ohio Railroad Company, et al. v. United States of America, et al.*, No. 642, October Term, 1966. The Commission's further Order dated September 29, 1966, setting hearings in these proceedings, is at page 1787 of the record on appeal and a copy is attached as Appendix "C" to the above-mentioned Jurisdictional Statement of *Baltimore & Ohio Railroad Company, et al. v. United States of America, et al.*, No. 642, October Term, 1966.

JURISDICTION

This suit was brought under Title 5, U.S.C. § 1009, and Title 28, U.S.C. §§ 1336, 2284 and 2321-25, to annul and set aside in part an order of the Interstate Commerce Commission dated April 6, 1966, as modified by its order dated September 16, 1966, and to obtain injunctive relief. The order of the district court, denying the motions for an interlocutory injunction, was entered on October 4, 1966. Notice of appeal was filed in that court on November 2, 1966. The jurisdiction of the Supreme Court to

review this order by direct appeal is conferred by Title 28 U.S.C. §§ 1253 and 2101(b).

STATUTES INVOLVED

The statutes involved in this case are: Administrative Procedure Act, Sections 5, 8(b), 10(c), 10(d), 10(e); 5 U.S.C. §§ 1004, 1007(b), 1009(c), 1009(d), 1009(e); Judicial Code, 28 U.S.C. §§ 1253, 1336, 2101(b), 2284, 2321-25; Interstate Commerce Act, Sections 5(1), 5(2), 5(9) and 5(11); 49 U.S.C. §§ 5(1), 5(2), 5(9) and 5(11). The texts of these statutes are attached hereto as Appendix "A".

QUESTIONS PRESENTED

1. Whether the district court, like the Commission, erred in failing or refusing to recognize that the *total* impact upon appellant and other unprotected carriers will result from the merger *plus* the indemnity conditions, and that neither of these can be isolated and considered separately in assessing such impact?

2. Whether the district court erred in holding that appellant is not faced with irreparable injury from consummation of the Penn-Central merger, as conditioned by the Commission?

3. Whether the district court erred in failing to assess the public interest in the impact of the merger, as conditioned by the Commission, on appellant and other unprotected railroads, and in permitting the merger to be consummated when the Commission itself has not yet finally made such an assessment?

4. Whether Section 5(2) of the Interstate Commerce Act requires the Commission to determine the legality and propriety of essential conditions to a merger before such merger is consummated?

5. Whether Sections 5(1) and 5(2) of the Interstate Commerce Act permit the Interstate Commerce Commission to create, prior to hearing on the public interest as-

pects thereof, an arrangement among competing railroads for the pooling of revenues and traffic or, in antitrust terminology, a "loose combination" of competing railroads?

6. Whether the district court erred in substituting its own grounds to justify immediate consummation of the Penn-Central merger after holding that the ground relied upon by the Commission itself could not be sustained?

7. Whether the district court, in the absence of a finding by the Commission that it could at some future time prescribe effective conditions to its approval of the Penn-Central merger, erred in assuming that the Commission could prescribe such conditions at some future time?

8. Whether the district court erred in holding that a reviewing court can at some future time, after consummation of the Penn-Central merger, order the Commission to prescribe effective conditions for the protection of appellant and other railroads?

9. Whether the district court erred in holding the balance of equities to be in favor of consummation of the merger because appellant and other plaintiffs in the court below did not agree to waive final review of the conditions to be prescribed by the Commission on further hearing?

STATEMENT

This is an appeal from an order of the United States District Court for the Southern District of New York denying a motion for interlocutory injunction against Orders of the Interstate Commerce Commission which authorize and permit consummation of a merger between the Pennsylvania Railroad Company and the New York Central Railroad Company. Appellant is a Class 1 railroad, operating in the northeastern quadrant of the United States, between Chicago, Illinois and Evansville, Indiana, Chicago and St. Louis, Mo.; and Chicago and the coal fields of

Southern Illinois. It competes intensively with both the Pennsylvania Railroad and the New York Central Railroad. Appellant is one of the eastern railroads referred to collectively in the majority opinion below as the "non-protected" (R. 1703) or "unprotected" carriers (R. 1712). The other "unprotected carriers" are the Baltimore and Ohio, Central of New Jersey, Chesapeake and Ohio, Norfolk and Western, Reading, and Western Maryland. Other railroads involved in this case are the Erie-Lackawanna, Delaware & Hudson and Boston & Maine, referred to collectively in the majority opinion as the "protected carriers" (R. 1698); and the Pennsylvania, New York Central and New York, New Haven & Hartford, which comprise the contemplated Penn-Central system.

The Pennsylvania and the New York Central are the two largest railroads serving the eastern part of the United States, and the proposed merger will be one of the largest, if not the largest, ever undertaken in the United States. In view thereof, a number of small eastern railroads, including appellant C&EI, intervened in the proceedings before the Interstate Commerce Commission and requested that, if the proposed merger were approved, certain conditions be attached to such approval. Appellant C&EI asked for operating and traffic protective conditions to ameliorate the impact of the merger on its traffic and revenues (discussed *infra*, page 22, footnote 10). The New Haven, Brooklyn Eastern District Terminal, New York, Susquehanna & Western, Erie-Lackawanna, Delaware & Hudson and Boston & Maine sought inclusion in the transaction if the merger were approved.

The Examiners recommended inclusion of the freight operations of the New Haven and the Susquehanna in the merged company, but recommended denial of the request of the other railroads seeking inclusion. The Examiners also refused to provide for conditions for the protection of the traffic and revenues of other carriers, other than the so-called "standard conditions," which the New York

Central traffic witness had described as "worthless" (R. 882).

In its report and order of April 6, 1966, the Commission adopted the approach recommended by its Examiners as to most of the eastern railroads. It adopted the finding that the traffic that would be lost by them would be offset by — "the creation of new traffic relationships between such non-participating carriers . . . [so] that the net effect will not be detrimental to such carriers" — (327 I.C.C. at 481).

The Commission also made specific findings with respect to the impact of the merger on Appellant C&EI. These were: (1) C&EI's service is superior to that which will be provided by the merged company in the pertinent areas of competition; (2) C&EI undoubtedly will have the benefit of intensified competitive efforts by the carriers with which it participates in the movement of traffic; and (3) in the event of its affiliation with the Missouri Pacific, C&EI will be strengthened and fortified against the effects of the Penn-Central merger (327 I.C.C. at 541-542).

With respect to finding No. 1, above, regarding service, the Commission fourteen months previously had found on a comprehensive record that C&EI is "a relatively small, financially weak, and physically deficient railroad" unable "to successfully compete with the relatively large, well equipped, vigorous, long-line railroads operating in the same territory."[1] No attempt was made in the instant proceeding to rebut those findings and no evidence was introduced to show the type of service provided by the C&EI.

Finding No. 2, above, regarding competitive efforts of C&EI connections, was made without a scintilla of evidence

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[1] Missouri Pacific R.R. Co. - Control - Chicago & Eastern Illinois Railroad Company, F.D. No. 21755 (decided February 16, 1965, not yet reported).

to support it; evidence as to the effect of the merger on only one of the C&EI's connecting carriers to the East (Erie-Lackawanna) was introduced, and as to that carrier the Commission found that the effect of the merger would be injurious. Since issuance of the Commission's report and order of April 6, 1966, the other connecting carriers referred to by the Commission have contended forcefully that they will suffer irreparable injury by the merger as conditioned by the Commission.

Regarding finding No. 3, above, no party even attempted to introduce evidence before the Commission on this point, and the C&EI's affiliation with the Missouri Pacific has been stayed pending appeal to this Court,[2] while the Penn-Central merger and the community of interests created by the Commission would become effective immediately.

As to three railroads, the Erie-Lackawanna, Delaware & Hudson and Boston & Maine, the Commission prescribed a number of protective conditions designed to protect their revenues and to some extent their traffic from the harmful effects of consummation of the merger (327 I.C.C. at 529-534 and 561-563). The Commission prescribed certain conditions set forth in Appendix "G" to its Report assertedly to protect the traffic of these three railroads (327 I.C.C. at 561). The Commission also imposed certain conditions providing for indemnification of the three protected carriers in the event their earnings were to fall below certain levels as compared with earnings of the merged company (327 I.C.C. at 529-535). The indemnity provisions were premised on the belief that the merged company would divert substantial amounts of freight traffic from the protected carriers.

Application of the indemnity provisions would result in the protected carriers receiving indemnity payments from

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[2] Illinois Central Railroad Company v. United States, et al., No. 687, October Term, 1966.

the merged company on traffic which they divert to the merged company from other eastern railroads, including appellant C&EI. These indemnity arrangements have created a strong community of interest between the merged company and each of the protected carriers. To the extent that the protected carriers can divert traffic from other eastern railroads to the merged company, they could increase the amount of their indemnities; and to the extent that the merged company can divert traffic from other eastern railroads to the protected carriers, the amount of these indemnities would be reduced. The extent to which appellant C&EI would be affected is indicated by reference to the findings of the Examiners, adopted by the Commission. Those findings are that C&EI and its connections actively compete with the Pennsylvania and the New York Central for traffic to and from eastern, midwestern, southern and southwestern states; that C&EI and the New York Central today maintain comparable service routes between Chicago and the C&EI's southern and western gateways, St. Louis, Missouri and Evansville, Indiana (R. 876-877); and that the Erie-Lackawanna is one of the C&EI's major connections to the East (R. 881). The Erie-Lackawanna operates between New York and New Jersey on the east and Chicago on the west, where it connects with appellant C&EI, the Pennsylvania and the New York Central, among others. On traffic moving beyond Chicago to St. Louis and the Southwest and West, and to Evansville, Indiana and the South, the indemnity conditions would supply a strong incentive to the Erie-Lackawanna to route its traffic beyond Chicago via the New York Central to St. Louis or Evansville or via the Pennsylvania to Louisville, Ky. By the same token, the Delaware & Hudson and Boston & Maine will be able to take their long hauls on traffic destined to and beyond the area served by the C&EI, and route it via the merged company rather than via the C&EI and its eastern connections.

In addition to the traffic in which the C&EI participates with one or more of the protected carriers, there will also

be substantial diversions of traffic in which the C&EI now participates with its other major connections to the east. The Examiners and the Commission found that these major connections, in addition to the Erie-Lackawanna and the Pennsylvania and New York Central, are the Grand Trunk Western, Chesapeake & Ohio, Baltimore & Ohio, and Norfolk & Western (at that time the Nickel Plate) (R. 881). The last three of those named are contending strenuously that the community of interest created by the indemnity conditions will have a substantial, adverse impact on their traffic and revenues; and that, among other things the solicitation forces of the merged company and the protected carriers will of necessity, motivated by self-interest, solicit traffic to move via routes of the merged company and the protected carriers. Appellant C&EI therefore will suffer further losses of revenues and traffic in which it participates with these three unprotected railroads.

These indemnity conditions, on which no hearing was ever held or notice given to the parties, therefore completely nullify the Commission's finding that the losses to be suffered by the unprotected carriers would be offset by new traffic relationships created among non-participating railroads. They also demolish the Commission's specific finding that — "C&EI undoubtedly will have the benefit of intensified competitive efforts by the carriers with which it connects on routes competitive with the Transportation Company" — (327 I.C.C. at 541, 542).

Appellant C&EI is faced not only with the inevitable prospect that traffic losses as a result of the merger will not be offset by the alleged benefits flowing from intensified competitive efforts of its unprotected connections, but also with the inevitability that it will suffer additional losses of traffic through diversion of traffic by the protected carriers to the merged company as a result of the indemnity arrangements.

Appellant C&EI and other unprotected carriers therefore petitioned the Commission for reconsideration of its

Report and Order of April 6, 1966, for postponement of consummation of the merger, and for hearing on the indemnity arrangements, pointing out that such arrangements would have the effects mentioned above, and that not a scintilla of evidence concerning such arrangements had been introduced at the hearings. The protected carriers, dissatisfied with the protection afforded by the Commission's Report and Order of April 6, 1966, also petitioned for reconsideration and further hearing.

The statutory defendant, the United States, took the position before the Commission that the normal procedure of determining protective conditions before consummation of a merger should not be departed from in this case.

Since the Commission's order was to become effective on September 30, 1966, and since the Commission had not acted on the several petitions, the protected carriers and the unprotected carriers filed complaints during the period September 8, 1966 to September 13, 1966 in the Court below for injunction against enforcement of the Commission's Order of April 6, 1966.

On September 19, 1966, two days before argument on the motions in the Court below, the Commission served its Report and Order on Reconsideration, dated September 16, 1966. This Report and Order were specifically directed to the court actions. The Report and Order permitted immediate consummation of the merger, but set for further hearing the ramifications of the indemnity arrangements, including the effect of such arrangements on unprotected carriers, and provided that any indemnity payments would be retroactive to the date of consummation of the merger. The Report and Order on Reconsideration did not contain any indication as to how the Commission expects to accomplish its purpose of protecting the Erie-Lackawanna, Delaware & Hudson and Boston & Maine without injuring the unprotected carriers.

By supplemental complaints filed during the period September 19 to September 21, 1966, all plaintiffs in the

Court below challenged the lawfulness of the Commission's Report and Order on Reconsideration and renewed their request for a temporary restraining order and interlocutory injunction. The statutory defendant, the United States did not undertake to defend the Commission's action.

The Court below issued a temporary restraining order on September 21, 1966 and subsequently, on October 4, 1966, with one judge dissenting, denied all motions for an interlocutory injunction. This Court stayed the order of the District Court, and appellant C&EI filed its Notice of Appeal on November 2, 1966.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented by this appeal arise from the unprecedented action of the Commission in permitting consummation of the largest railroad merger in history and simultaneous creation of a community of interest with the protected carriers, before hearing any evidence or making any findings regarding matters that are critical to two large groups of railroad competitors of the merged company and which are crucial to a determination of whether the merger, as approved and conditioned by the Commission, is consistent with the public interest within the meaning of Section 5 (2) (b) of the Interstate Commerce Act (49 U.S.C. § 5 (2) (b)). The purpose of appellant C&EI in prosecuting this appeal is to protect itself and the public it serves from the substantial harm that would be inflicted upon them, until such time as the Commission performs its essential task of formulating protective conditions which do not impose injury upon appellant and its customers and which protect appellant from the impact of the merger and the indemnity conditions attached thereto.

The substantiality of the questions presented is demonstrated by the extent to which the Commission has departed from established administrative practice. The Commission, even with respect to small mergers, invariably has

settled prior to merger all questions relating to protection of other carriers. Here, however, the Commission not only has authorized consummation of the merger prior to making provisions for protection of other carriers but has compounded that error by attaching, as essential components of its merger orders and without hearing or findings, conditions which will have substantial adverse effects on the traffic and revenues of other carriers immediately upon consummation of the merger and simultaneous effectuation of the community of interests created by the Commission.

SUMMARY OF ARGUMENT

I and II [3]

The Commission adopted the findings of the Examiners as to the intensity of existing competition between the C&EI and its connections on the one hand and the Pennsylvania and the New York Central on the other. The Commission also made these additional findings: (1) C&EI service is superior to that which will be provided by the merged company in the pertinent areas of competition; (2) C&EI undoubtedly will have the benefit of intensified competitive efforts by the Eastern carriers with which it participates in the movement of traffic; and (3) in the event of its affiliation with the Missouri Pacific C&EI will be strengthened and fortified against the effects of the Penn-Central merger (327 I.C.C. at 541-542).

Fourteen months previously the Commission had found on a comprehensive record that C&EI is "a relatively small, financially weak and physically deficient railroad" unable "to successfully compete with the relatively large, well equipped, vigorous, long-line railroads operating in the same territory." No attempt was made in the instant proceeding to rebut those findings.

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[3] Keyed to the section headings in Argument.

With respect to the anticipated benefits of intensified competitive efforts of other carriers (having absolutely no foundation in the record), the Commission has found that one of them will be injured by the merger, and three of the other four of C&EI's major connections to the East are strenuously contending since issuance of the Commission's report and order of April 6, 1966 that they will suffer irreparable injury from the merger, as conditioned by the Commission.

Regarding the fortification against the effects of the merger that C&EI allegedly will derive from its affiliation with the Missouri Pacific (unfounded in the record), that affiliation, pending since 1961, has been stayed by the United States District Court for the Northern District of Illinois, while the Penn-Central merger and the community of interests created by the Commission would become effective immediately.

The Commission also adopted the finding of the Examiners that losses suffered by other carriers as a result of the merger will be offset by new traffic relationships that would evolve among such carriers. The Commission's action in attaching indemnity conditions and thereby creating a community of interests among the merged company and the protected carriers completely nullifies such finding, as well as the finding that the C&EI will benefit from intensified competitive efforts of other carriers in the East. The protected carriers (including one of the C&EI's major connections, the Erie-Lackawanna), in their own self-interest will route traffic beyond their lines via the merged company, and the merged company will route traffic beyond their lines via the protected carriers, all to the detriment of the unprotected carriers. This is so because the greater the spread between the revenues of the merged company and those of the protected carriers, the greater will be the indemnities to be paid, the less the spread, the smaller the indemnities.

The community of interests created by the Commission will become effective upon consummation of the merger and the anticipated diversions of traffic will commence on that date. Yet there will be no protection for the unprotected carriers.

III

The unprotected carriers filed affidavits in the court below showing that they would suffer losses of many millions of dollars as a result of the merger, as conditioned by the Commission. A counter-affidavit was filed by Penn-Central directed at the impact of the merger, *but not of the indemnity conditions*, on the unprotected carriers. The Commission had made no assessment of the impact of the merger, as conditioned, on the unprotected carriers, and the court clearly erred in failing or refusing to consider the substance of the affidavits submitted on behalf of the unprotected carriers. The Commission's statement that the task of implementing a merger of this size is vast and complex, relied upon by the majority below, clearly is irrelevant to the question whether the unprotected carriers will suffer irreparable injury as a result of the indemnity conditions.

IV

Section 5(2)(b) of the Interstate Commerce Act (49 U.S.C., Section 5(2)(b)) requires the Commission, in authorizing proposed carrier consolidations, to find that the proposed transaction is consistent with the public interest, and permits the Commission to prescribe such terms, conditions and modifications as it shall find just and reasonable. Substantial and hotly-contested issues are now before the Commission for hearing. These issues go to the very heart of the merits of the merger, for the Commission has stated that unless the "protected carriers" are protected during the period necessary to determine their future, it would not authorize consummation at this

time, even though approving the merger (327 I.C.C. at 532). But the three indicated carriers contend that the protection provided by the Commission is inadequate; seven unprotected carriers are seeking protection from operation of the indemnity conditions; and there is the further issue before the Commission as to whether provision should be made for capital loss indemnities.

The majority below said that they would not permit consummation of the merger if the protected carriers were thereby weakened. But who knoew at this time whether the conditions to be imposed by the Commission after further hearing will or will not weaken one or more of the protected carriers? And who can say that if the conditions are adequate they will not inflict even further harm on the unprotected carriers?

The issues left undetermined by the Commission obviously are vital to a determination of whether the merger as conditioned, is in the public interest. Moreover, the action of the Commission in reopening its proceeding for the purpose of determining the terms and ramifications of the indemnity conditions is inconsistent with the finding in its Report and Order of April 6, 1966 that the protective terms and conditions therein prescribed are required by the public interest.

Section 5(9) of the Interstate Commerce Act, which permits the Commission to issue supplemental orders in merger or consolidation proceedings, clearly does not empower the Commission to authorize consummation of a merger while leaving for future determination the terms and conditions essential for the protection of other carriers. The power under Section 5(9) to supplement a merger or consolidation order has been narrowly confined to instances in which there has occurred a material change of conditions[4], or in which the applicant has failed to abide

[4] City of New Orleans v. Texas and N. O. R. Company, 195 F.2d 882, 886 (5th Cir. 1952); City of New Orleans v. Texas and Pacific Railway, 195 F.2d 887, 889 (5th Cir. 1952).

by material representations made in the application[5]. An originally invalid order cannot be upheld on the ground that it may be validated by subsequent orders issued under Section 5(9)[6].

It is well-established that protective conditions cannot be deferred until after the transaction authorized is consummated. *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

V

The Commission has created, prior to hearing thereon, an arrangement for pooling of traffic and revenues within the meaning of Section 5(1) of the Interstate Commerce Act (49 U.S.C. Section 5(1)). The greater the spread between the revenues of the merged company and the revenues of each of the protected carriers in comparison with such spreads during the base periods, the greater will be the indemnities payable to the protected carriers; the less the spread, the smaller the indemnities. The incentive of each group, the merged company and the protected carriers, to favor each other on the routing of traffic beyond their own lines is just as compelling as if they had unified operating, traffic and solicitation forces. In fact, the arrangement probably is a more effective pooling arrangement than is the conventional type; it eliminates the sources of conflict that usually arise concerning operating and traffic implementation of pooling arrangements. The manner in which, and the extent to which, the C&EI will be adversely affected by this arrangement are demonstrated at pages 8-9, *ante*.

Section 5(1) empowers the Commission to approve pool-

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[5] Baggett Transportation Company v. United States, 206 F. Supp. 835, 842 (N.D. Ala. 1962).

[6] C.A.B. v. Delta Air Lines, Inc., 367 U.S. 316, 328 (1961).

ing or divisions of traffic, service, or gross or net earnings, *or any portion thereof*, of carriers subject to its jurisdiction, upon finding that such pooling or division will be in the interest of better service to the public or of economy of operation, and *will not unduly restrain competition.*

Since the indemnity arrangements are effective retroactively to the date of consummation of the merger, this pooling arrangement will become effective before any of the findings required by Section 5(1) can be made, even though Section 5(1) clearly has only prospective application.

Such an arrangement, in the absence of immunity granted by regulatory statute, clearly would violate the antitrust laws (15 U.S.C. Section 1).[7] Section 5(11) of the Interstate Commerce Act grants such immunity to carriers participating in a transaction approved or authorized under Section 5 of the Act. However, this immunity can be invoked only when Section 5 is strictly complied with and, as seen above, Section 5(1) has only prospective application and the requisite findings must be made *before* the pooling arrangement can be authorized *(idem).*

The Commission's assumption of power under Section 5(2) of the Act (49 U.S.C. Section 5(2)) to approve pooling arrangements to become operative *before* hearing evidence and making the findings required by Section 5(1) clearly is unlawful *(idem).*

The majority below did not rule on this issue, but hopefully stated that the Commission may decide to make findings under Section 5(1) in its report and order after further hearing. Even if it does, the findings will come too late to constitute compliance with the law.

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[7] Chicago & North Western Railway Company v. Peoria and Pekin Union Railway Company, 201 F. Supp. 241 (S.D. Ill. 1962), aff'd 319 F.2d 117 (7th Cir. 1963), cert. den. 375 U.S. 969 (1964).

VI

The crucial finding on which the Commission attempted to justify immediate consummation of the merger was that it was not prepared to take the risks which delay of consummation of even six or twelve months might entail in providing a solution of the New Haven problem. The court below rejected this reason in its entirety, stating: "It is unrealistic to suppose that inclusion of New Haven in the Transportation Company can be accomplished before conclusion of the Commission's reconsideration in this case . . ."

The court below could not and did not rely on either of the other two reasons stated by the Commission for permitting immediate consummation of the merger. With respect to the alleged uncertainty of "applicants' financial situation" referred to by the Commission, Penn-Central's combined consolidated net income had increased from $4,745,002 in 1961 to $122,469,097 in 1965. With respect to the Commission's statement that if consummation" is deferred several years or indefinitely, we can have no assurance that it will ever occur," the stockholders of the Pennsylvania and the New York Central as recently as July 1966 reaffirmed their support of the pending merger.

The majority below relied upon general findings made by the Commission in its report and order of April 6, 1966. These general findings are inadequate, for they do not deal with the impact of the combination of the merger and the indemnity conditions on the traffic and revenues of the unprotected carriers. These were material issues on which the Commission was required to make reasoned findings,[8] which it failed to do.

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[8] Burlington Truck Line v. United States, 371 U.S. 156, 168-169 (1962); Securities and Exchange Commission v. Chenery Corporation, 332 U.S. 194, 197 (1947).

VII

A basic theory on which the Commission approved the subject merger was that the adverse effects on other carriers would be offset by the competitive incentive the merger would afford them to cooperate among themselves in the movement of traffic. Yet, by committing itself to the prescription of indemnity conditions, the Commission has precluded the possibility that the protected carriers will cooperate with the unprotected carriers. The indemnity conditions provide the protected carriers with a strong incentive to cooperate, not with the unprotected carriers, but with the merged company, to the detriment of the unprotected carriers.

The Commission has not said that it can generate these cooperative arrangements in its report and order after further hearing and, in view of its commitment to the prescription of indemnity conditions, it seems rather clear that it cannot do so. The Commission cannot order the cooperation it had predicted and relied on.

The best that the majority below could say on this point was that in the Commission's report and order after further hearing "we *may* find provisions carefully tailored to prevent or, at least minimize, the feared manipulation or, conceivably, financial provisions of an entirely different character . . ." The highly speculative and hopeful nature of the court's statement points up the gross error committed in permitting consummation of the merger and simultaneous operation of the indemnity conditions prior to resolution of these many weighty problems.

VIII

The Penn-Central merger, as conditioned, will adversely affect the unprotected carriers during the period between consummation of the merger and such time as the Commission *may* devise (if it can) effective protective conditions. The right of an injured carrier to judicial re-

view after such consummation amounts to no more than a right to continue to subject itself to injury, with the merged company as the beneficiary of such injury.

The majority below did not recognize the inevitability of such injury during the interim period. However, with respect to prospective application of such conditions as might be prescribed by the Commission after further hearing, the majority below stated that, on further judicial review, it could "require appropriate change" and could inform the Commission precisely what conditions the reviewing court felt should be imposed. This view clearly is contrary to well established principles. *Federal Power Commission v. Idaho Power Company*, 344 U.S. 17, 20 (1952). And what are, or will be, the "appropriate changes," and how long will it take to adopt them. The majority below acknowledged that the merger, once consummated probably could not be dissolved.

IX

The majority of the court below stated that exercise of the right of plaintiffs therein to judicial review would entail delay of approximately nine months after the Commission issues its report and order after further hearing. Pennsylvania and New York Central have agreed to forego judicial review of most, *but not all*, of the conditions to be prescribed after further hearing. Because it was dealing with "different periods of time," the majority below held the balance of equities to be in favor of immediate consummation of the merger. If the majority's reasoning has any validity at all, the right to judicial review is indeed meaningless.

The majority also felt that "the long delay" in completion of the Commission's proceedings strongly favored permitting immediate consummation of the merger. Penn-Central's application for authority to merge was filed in 1962, Missouri Pacific's application for authority to acquire control of the C&EI was filed in 1961, and

the application of the Seaboard Air Line and Atlantic Coast Line for authority to merge was filed in 1960. Consummation of the latter two transactions has been stayed pending review by this Court. On the other hand a final order has not yet been entered in the Penn-Central merger proceeding; hearings are now being held on substantial issues; yet the court below has permitted the merger to be consummated because of a "delay" of shorter duration that those involved in the Missouri Pacific — C&EI and Seaboard Air Line — Atlantic Coast Line consolidations.

The Penn-Central merger is one between two large and highly prosperous railroads. On the other hand, appellant C&EI was described by the Commission in 1965 as a "relatively small, financially weak and physically deficient railroad."[9] Yet the C&EI is left unprotected not only against the impact of the merger itself but also against the impact of the simultaneously-created community of interests between the merged company and the protected carriers.

No railroad merger of any size has ever been permitted to be consummated prior to judicial review.

The equities overwhelmingly require postponement of the Penn-Central merger until adequate protection can be formulated for the C&EI and other unprotected carriers.

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[9] Missouri Pacific Railroad Company - Control - Chicago & Eastern Illinois Railroad Company F.D. No. 21755, decided February 16, 1965 (not yet reported).

ARGUMENT

I

The Court Below, Like the Commission, Erred in Failing To Recognize That the Total Impact Upon Appellant and Other Unprotected Carriers Will Result From a Combination of the Merger and the Indemnity Conditions, and That Neither of These Can Be Isolated and Considered Separately in Assessing Such Impact.

Appellant C&EI, in support of its request for operating and traffic conditions, introduced evidence of potential diversion of its traffic by the merged company.[10] The Examiners made comprehensive findings concerning the intensity of the competition that exists between the C&EI and its connections on the one hand and the Pennsylvania and New York Central on the other, and concerning the competitive routes of the C&EI and the New York Central in the Midwest (R. 876-877). The Examiners also found that the C&EI's major connections to the East, in addition

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[10] These conditions are set forth at pages 871-872 of the record. One of the conditions would require the merged company, because of changes in its operations in western Illinois, to maintain at present dollar levels rental charges for C&EI trackage rights over a segment of its line in that area. A second condition would require the merged company to maintain its present freight schedules unless the revised schedules would not adversely affect the merged company's connections. A third condition is designed to prevent the merged company from instituting new rates via junctions and gateways without making such rates available to its connecting railroads, with just and reasonable divisions of revenues. The 4th condition would require that new industries located at points served by the merged company in common with any other railroad shall be open to reciprocal switching, a common practice in the Midwest. The 2nd and 3rd conditions are similar to conditions 6, 7 and 8 attached to the Commission's approval of the merger involved in Seaboard Air Line - Merger - Atlantic Coast Line, 320 ICC 122, 267.

to the Pennsylvania and the New York Central, are the Chesapeake and Ohio, Baltimore and Ohio, Nickel Plate (now the Norfolk and Western), Erie-Lackawanna, and Grand Trunk Western (R. 881). The Commission adopted these findings (327 I.C.C. at 481). Of these, the only evidence of competition with the Pennsylvania and the New York Central for traffic and revenues was that of Erie-Lackawanna, and it showed that that carrier would be seriously injured by the merger.

Notwithstanding the foregoing, the Commission, in denying Appellant C&EI's request for traffic conditions, found that the C&EI "undoubtedly will have the benefit of intensified competitive efforts by the carriers with which it connects on routes competitive with those of the Transportation Company" (327 I.C.C. at 541-542). However, the Commission's action in creating a combination or community of interest between the protected carriers and by far the largest railroad in the nation compelled the Chesapeake and Ohio, Baltimore and Ohio and Norfolk and Western (none of whom had participated in the hearing) to protest the merger, as conditioned, on the grounds that it would have serious adverse effects on their respective traffic and revenues.

The Commission, in its report and order of April 6, 1966, quite obviously had created a new type of commercial arrangement much different from the merger that was before it for approval, and much more formidable in its potential impact on other carriers. The Commission's action in creating this new type of commercial combination of competitors completely demolished the above-quoted finding regarding the benefits that would flow to the C&EI from intensified competitive efforts of its connections to the east. Such action also nullified the Commission's finding that traffic losses suffered by other carriers as a result of the merger would be offset by new traffic relationships that would evolve among such carriers. The protected carriers, in their

own self-interest, will route traffic beyond their lines via the merged company, to the detriment of the unprotected carriers. There will be no "intensified, competitive efforts" and no new traffic relationships other than those that benefit the merged company and the protected carriers.

In permitting, in its Report and Order on Reconsideration, the merger and the retroactive indemnity conditions to become effective immediately and simultaneously, the Commission refused to consider the impact of the merger combined with the retroactive indemnity conditions on the revenues of the unprotected carriers. Yet it was this community of interests thereby created that had impelled six of the seven unprotected carriers to protest for the first time in their petitions for reconsideration the Commission's approval of the merger as conditioned. The seventh unprotected carrier, Appellant C&EI, has asserted that the indemnity conditions would compound the economic injury that would befall it as a result of the merger.

Nor can it be argued that the Commission will, or even might, consider the total impact of the merger and the indemnity conditions in its report and order on further hearing; it denied, in its report and order on reconsideration, a petition of the Chesapeake and Ohio and the Baltimore and Ohio for further hearing on the impact of the merger itself on their revenues, thereby indicating quite clearly its refusal to consider such matters in its further report and order. Even if the Commission were to consider such total impact in its further report and order, the unprotected carriers would be the victims of such impact in the interim.

The majority of the court below, without referring to any of the evidence, fell into the same error, stating (R. 1703):

> "We also see no prospect that C. & E. I. or any other non-protected carrier would be able to persuade a

> reviewing court to set aside for lack of substantial evidence the findings of failure to show serious diversion arising from the merger itself, *as distinguished from the new problems* allegedly engendered by the indemnity formula which are *yet to be ruled upon.*" (Emphasis supplied.)

As pointed out in Section III, *infra*, pages 28-29, the majority of the court below refused to consider, or at least gave no weight to, the immediate impact of the retroactive indemnity conditions, even when isolated from the merger itself.

The court below clearly erred in permitting the merger to be consummated and the indemnity conditions to become effective simultaneously therewith, without assessing their impact on other carriers.

II

The Court Below Erred in Holding That Appellant C&EI Is Not Faced With Irreparable Injury From Consummation of the Merger as Conditioned by the Commission.

In addition to the finding discussed in the preceding section of this Statement and Brief, the Commission in its report and order of April 6, 1966 made two other findings regarding the impact of the merger on the C&EI. One of these was that "in the event its affiliation with Missouri Pacific is realized, C&EI will be further strengthened — as to finances, equipment, traffic, solicitation force and other important factors — further fortifying it against the competitive effects of applicants' merger" (327 I.C.C. at 542). However, this affiliation, which was authorized in February, 1965 (14 months prior to authorization of the Penn-Central merger) has been stayed by the court, pending determination by the United States District Court for the Northern District of Illinois, and subsequently pending appeal to this Court. *Illinois Central Railroad Company v. United States, et al.*, No. 687, October Term, 1966.

In the Missouri Pacific - C&EI proceeding (*Missouri Pacific Railroad Company - Control - Chicago & Eastern Illinois Railroad Company*, Finance Docket No. 21775, not yet reported), the Commission found at Sheets 58-59:

> "A denial of the applications herein, on whatever ground, would leave Eastern independent, as a relatively small, financially weak, and physically deficient railroad lacking the reserve and source of ready assistance needed to successfully compete with the relatively large, well-equipped, vigorous, long-line railroads operating in the same territory, and with the increasingly dynamic carriers of the other modes of transportation.
>
> * * *
>
> "To deny Eastern the relief and assistance offered through the several proposals now before us, would leave it foundering and of diminishing value to either the public generally or to its own security holders."

Yet the C&EI, its affiliation with the Missouri Pacific having been stayed for almost two years as of this date, not only has been left unprotected from the impact of the Penn-Central merger but now is faced with additional and inevitable devastation from the Commission-created community of interests of the merged company and the protected carriers.

But even if the C&EI's affiliation with the Missouri Pacific were to be consummated immediately, and even if such alliance would have the extensive protective qualities assumed by the Commission, such would not insulate the C&EI from the interim adverse effects of the combination or community of interest created by the Commission. This combination, because of its retroactive features, would immediately assert its traffic diversionary influences. As the Commission stated in its report and order on reconsideration of the Penn-Central merger, "the task of implementing a merger of this size is so vast and complex that its competitive effects will be felt only gradually" (R. 1712). Certainly the same is true on a

smaller scale of the Missouri Pacific - C&EI affiliation, which certainly would not in any way or to any extent protect the C&EI from the immediate impact of the community of interests created by the Commission.

Further, there is absolutely no evidence in the record that the benefits to be derived by the C&EI from its affiliation with the Missouri Pacific will enable it to compete with the merged company, nor did the Examiners, the Commission, the Court below, or any party, even imply that there is any such evidence. Obviously, a Missouri Pacific - C&EI alliance is not to be compared by any standard of measurement with the merger of the Pennsylvania and the New York Central.

The third finding of the Commission regarding future competition between the C&EI and Penn-Central was that the C&EI "does not give adequate weight to its own ability to provide superior service in the pertinent areas of competition" (327 I.C.C. at 541). Again, neither the Examiners, the Commission, the Court below, nor any party, has even hinted that there is any evidence of record to support a finding as to the C&EI's "superior service." The only findings based on evidence of any kind regarding C&EI's services are those in *Missouri Pacific Railroad Company - Control - Chicago & Eastern Illinois Railroad Company*, F.D. No. 21775, not yet reported. Those findings, made in February, 1965, were that C&EI is "relatively small, financially weak and physically deficient," and unable "to compete with the relatively large, well equipped, vigorous, long-line railroads operating in the same territory" (Sheets 58-59).

Thus it is quite obvious that the Commission's assessment of the impact of the merger itself on the C&EI is totally erroneous.

The C&EI submitted an affidavit in the Court below (R. 864-899) showing how the merger as conditioned would cause it irreparable injury. No rebuttal affidavit was submitted; defendants therein apparently preferring to rely

on the Commission's findings, which have been shown to be completely unfounded. They are further defective in that they were not addressed to the impact of the merger *plus* the indemnity conditions.

Faced with the inevitable prospect of diversion of its traffic by the merged company, the unprotected C&EI is now confronted with the inevitability of *immediate* further diversion of its traffic as a result of the community of interests *created by the Commission,* without hearings or findings, in its reports and orders in the Penn-Central merger case.

Appellant C&EI clearly will suffer immediate and irreparable injury from the merger as conditioned by the Commission.

III

The District Court Erred in Failing To Assess the Public Interest in the Impact of the Merger, as Conditioned by the Commission, on Appellant and Other Unprotected Carriers, and in Permitting the Merger To Be Consummated When the Commission Itself Has Not Yet Made Such an Assessment.

The Commission made no findings on the impact of the merger, as conditioned, on the unprotected carriers, nor could it have done so, since it had not yet held hearings on such impact.

The unprotected carriers filed affidavits in the court below showing that they would suffer losses of many millions of dollars in revenues as a result of the merger as conditioned by the Commission. The majority of the court below brushed aside these contentions with the following statement (R. 1712-1713):

> "All that remains is the claim that the very potentiality of retroactive indemnity provisions similar to those initially prescribed will lead the protected carriers and the Transportation Company, imme-

diately on consummation, to pursue the same diversionary tactics the complainants fear. But we cannot find, in the light of the opposing affidavits submitted by NYC, of the Commission's finding in its report on reconsideration that the task of implementing a merger of this size is so vast and complex that its competitive effects will be felt only gradually, and of our subsequent discussion, that the possibility of such action for the period required for reconsideration and review poses such a serious threat of unwarranted legal injury to the unprotected carriers as to justify a temporary injunction against consummation, in the light of the countervailing factors we have outlined."

However, the affidavit of the New York Central's affiant was not addressed to the traffic diversions resulting from the indemnity provisions (R. 785-820),[11] and the Commission's finding that it will take time to implement the merger is completely irrelevant to the traffic diversions that will result immediately from the traffic and revenue pool which will become effective on the date of consummation.

The reasons advanced by the majority below for refusing to consider the impact of the retroactive indemnity conditions are clearly irrelevant and premised on a misconception of the representations made by the New York Central's affiant. The court erred in rejecting the unrebutted statements in the affidavits of the unprotected carriers and permitting the merger and the indemnity conditions to become effective immediately and simultaneously, prior to determination of these important issues by the Commission.

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[11] In fact, it did not even refer to, and was not addressed to, the contentions of the C & E I set forth in its affidavit at R. 864-899.

IV

The Court Below Erred in Permitting Consummation of the Merger Prior to the Commission's Determination of Issues Which Constitute Vital and Integral Components of the Public Interest Which the Commission Is Required To Consider Prior to Its Authorization of Consummation.

Section 5(2)(b) of the Interstate Commerce Act (49 U.S.C. Section 5(2)(b)) authorizes the Commission to approve proposed mergers among carriers subject to its jurisdiction upon finding that the proposed transaction is consistent with the public interest and upon such terms, conditions and modifications as it shall find just and reasonable. Hearings are now being conducted as to what the terms, modifications and conditions should be, and whether they will be in the public interest; no findings as required by Section 5(2)(b) have yet been made on very serious and important issues.

The issues now before the Commission on further hearing go to the very heart of the merits of the merger, for, as the Commission stated (327 I.C.C. at 532):

> "It is doubtful that, without inclusion in a major system, these three [protected] carriers could withstand the competition of the applicants merged, and, unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time, even though approving the merger."

But the three indicated carriers are contending that the protection provided by the Commission in its Reports and Orders is inadequate; seven unprotected carriers are seeking protection from operation of indemnity conditions that they could not possibly have anticipated, and there remains the further substantial question whether provision should be made for capital loss indemnities. All of these crucial matters are to be determined *after* the merger is consummated and *after* the retroactive indem-

nity conditions become effective, with their immediate impact upon the traffic and revenues of the unprotected carriers. The Commission has no greater conception than do the parties to the proceeding of the means by which it can protect the "protected carriers" from the impact of the merger without at the same time adversely affecting the "unprotected carriers," or how it can reconcile the many conflicting interests. Even if the Commission can reconcile such interests, there will be a considerable period of time during which the retroactive indemnities or pooling arrangements would become effective and the date when protection will become available to the unprotected carriers.

The issues left undetermined by the Commission obviously are vital to a determination by the Commission whether the merger as conditioned is in the public interest. *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966), is authority for the proposition that provision of protective conditions cannot lawfully be deferred until after the transaction itself is authorized and becomes effective. Moreover, the action of the Commission in its Report and Order of September 16, 1966 in reopening its proceeding for the purpose of determining the terms of the indemnity conditions and the ramifications thereof, directly conflicts with the Commission's findings in its Report and Order of April 6, 1966 as to what protective terms and conditions are required in the instant case.

Nothing in Section 5(2)(b) or Section 5(9) of the Interstate Commerce Act empowers the Commission to authorize consummation of a merger while leaving for future determination the terms and conditions essential for the protection of other carriers. The dissenting judge below ably and comprehensively summarized the law on this point (R. 1745-1750), and his views thereon are attached hereto as Appendix B.

The power under Section 5(9) to supplement a merger or consolidation order has been narrowly confined to in-

stances in which there has occurred a material change of conditions [12], or in which the applicant has failed to abide by material representations made in the application. [13] An originally invalid order cannot be upheld on the ground that it may be validated by subsequent orders issued under Section 5(9). [14]

We know of no merger, involving even the smallest railroads, that was permitted to be consummated prior to determination of its impact on other carriers and provision made for protection of such other carriers as might be injured thereby. Here the Commission has gone far beyond authorizing consummation of the largest merger in railroad history; it has simultaneously authorized consummation of merger and created a community of interests between the merged company and the three protected carriers, that will cause irreparable injury to carriers not participating in the arrangements so created. Such action, without hearing and findings, clearly is not consistent with the public interest and is beyond the Commission's powers under Section 5.

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[12] City of New Orleans v. Texas and N.O.R. Company, 195 F.2d 882, 886 (5th Cir. 1952); City of New Orleans v. Texas and Pacific Railway, 195 F.2d 887, 889 (5th Cir. 1952).

[13] Baggett Transportation Company v. United States, 206 F. Supp. 835, 842 (N.D. Ala. 1962).

[14] C.A.B. v. Delta Air Lines, Inc., 367 U.S. 316, 328 (1961).

V

The Court Below Erred in Permitting the Interstate Commerce Commission To Create, Prior to Hearing and Findings on the Public Interest Aspects Thereof, an Arrangement Among Competing Railroads for the Pooling of Traffic and Revenues.

There can be no doubt that the Commission has created, prior to hearing thereon, an arrangement for the pooling of traffic and revenues within the meaning of Section 5(1) of the Interstate Commerce Act (49 U.S.C. Section 5(1)). The amounts of the indemnities payable to the protected carriers will depend upon the spread between the revenues of the merged company and the respective revenues of each of the protected carriers in comparison with such spreads during the base periods set forth in the Commission's Report and Order of April 6, 1966. The greater the spread, the greater the indemnities; the less the spread, the smaller the indemnities. The incentive of each group, the merged company and the protected carriers, to favor each other on the routing of traffic beyond their own lines is just as compelling as if all four carriers were to place their equipment in common pools and to have unified operating, traffic and solicitation forces. In fact, the creature of the Commission probably is a more effective pooling arrangement than the railroads themselves could have devised or effectuated, because it eliminates the sources of conflict that usually arise concerning operating and traffic details of pooling arrangements. Further, we have not been able to find any decision of the Commission indicating that it would have approved such an arrangement had one been submitted to it as an independently originated plan.

Such an arrangement, in the absence of immunity granted by a regulatory statute, clearly would violate the antitrust laws (15 U.S.C. Section 1, *et seq.*). *Chicago & Northwestern Ry. v. Peoria & P. U. Ry.*, 201 F. Supp. 241 (S.D. Ill. 1962), aff'd, 319 F.2d 117 (7th Cir. 1963), cert. denied,

375 U.S. 969 (1964). Section 5(11) provides in part that any carriers participating in a transaction approved under Section 5 shall be relieved from the operation of the anti-trust laws and from all other restraints, limitations and prohibitions of law, insofar as may be necessary to enable them to carry into effect the transaction so approved. But strict compliance with the regulatory statute is a condition precedent to invocation of this immunity, and Section 5(1) requires hearing and findings by the Commission, *prior* to granting its approval, that the arrangement will be in the interest of better service to the public or of economy of operation *and will not unduly restrain competition.*

Since the indemnity arrangements under the Commission's existing orders are effective retroactively to the date of consummation of the merger, this pooling arrangement will become effective before any of the findings required by Section 5(1) can be made. The manner in which, and the extent to which, the C&EI will be adversely affected by this pooling arrangement are demonstrated on pages 8-9, *ante*.

The Commission's assumption of power under Section 5(2) of the Act to approve pooling combinations without regard to the necessity for evidence and findings as required by Section 5(1) clearly is unlawful. *Chicago and Northwestern Ry. v. Peoria & P. U. Ry., supra.* That case involved a contract between two railroads whereby one would handle the transfer and switching of all cars of the other in the City of Peoria. The contract had never been submitted to the Interstate Commerce Commission for approval, but it was contended by one of the railroads that extension of the agreement had been approved by the Commission under Section 5(2) of the Act. In rejecting this argument concerning the powers of the Commission under Section 5(2), the District Court stated at page 254:

> "Section 5(2), 49 U.S.C.A. § 5(2), provides that the I.C.C. may approve an agreement for the joint use of facilities by two or more carriers if it finds

that such joint use 'will be consistent with the public interest'. *The standard for Section 5(1) approval is more restrictive.* Thus, the I.C.C. may approve a pooling agreement under 5(1) only if it finds that such pooling 'will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition'. (Emphasis supplied.)

"Section 5(1) is explicit in its provisions. The precise standards fixed by Congress may not be diluted by application of a doctrine of implied ratification. Cf., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 225-227, 60 S. Ct. 811, 84 L. Ed. 1129; United States v. Maryland & Virginia Milk Producers' Ass'n, D.D.C., 167 F. Supp. 799, 808, aff'd, 362 U.S. 458, 80 S. Ct. 847, 4 L. Ed. 2d 880. Before a pooling agreement becomes lawful, it must have been submitted to the I.C.C. upon an application invoking Section 5(1), Cf., Norfolk & Southern Bus Corp. v. Virginia Dare Transp. Co., supra, 159 F.2d at 310-311, and approval must have been granted upon express findings in accordance with the statutory standard.

"To the extent hereinabove indicated, the 1911 contract violates Section 5(1) and is void and unenforcible."

In affirming, the Circuit Court of Appeals held at page 122:

"Although the 1911 contract was never approved by ICC under Section 5(1), P&PU refers to the proceedings of the ICC in 1946 where proceedings were had under Section 5(2) (49 U.S.C. § 5(2)). However, the 1946 proceedings cannot be substituted or take the place of proceedings under Section 5(1). The Commission never made the findings required under Section 5(1) that the pooling provisions of the joint use contract '* * * will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition * * *'."

This Court denied certiorari, 375 U.S. 969 (1964).

The traffic arrangements inherent in the indemnity arrangements in the instant case are no different in their

effect than the traffic arrangement involved in the *Chicago and Northwestern* case, above. Such arrangements, of themselves and without any "manipulations," make it imperative that the merged company route traffic beyond its lines to the protected carriers and that the protected carriers route traffic beyond their respective lines to the merged company. In addition, payments of indemnities, contemplated by the Commission's Reports and Orders, are revenue pools within the meaning of Section 5(1).

Obviously, the Commission has created a double-pronged traffic and revenue pool without conducting hearings or making the findings required by Section 5(1) of the Interstate Commerce Act.

The only discussion of this issue by the majority below consisted of a statement that in the Commission's report and order after further hearing, perhaps there will be no provisions that could arguably come under Section 5(1); and if there are the Commission may decide to make findings under Section 5(1), and these also can be reviewed (R. 1712). However, Section 5(1) requires the Commission to find that the pooling arrangements "will be" in the interest of better service or economy in operation and "will not" unduly restrain competition. Yet the traffic and revenue pool will become operative on the day the merger is consummated, *before* any of the required findings can be made. Pool operations prior to such findings as to the future clearly violate Section 5(1) and the antitrust laws, as to which the immunity provided by Section 5(11) of the Interstate Commerce Act cannot be invoked. *Chicago and Northwestern Railway Company v. Peoria and Pekin Union Railway Company*, 201 F. Supp. 241 (S.D. Illinois 1962); aff'd 319 F.2d 117 (7th Circuit 1963); cert. denied 375 U.S. 969 (1964).

VI.

The Court Below Erred in Substituting Its Own Grounds To Justify Immediate Consummation of the Merger After Holding That the Ground Relied Upon by the Commission Could Not Be Sustained.

The Commission in its consideration of "Time of Consummation" in its Report and Order on Reconsideration, set forth what it then felt to be an impelling reason for immediate consummation of the merger. The crucial finding on which the Commission attempted to justify its departure from all reason, logic and precedent was the following:

> "We are not prepared to take the risks which delay of consummation of even six or twelve months might entail in providing a solution of the New Haven problem other than liquidation."

But disclosures before the court below led it to unanimously reject the foregoing as a basis for immediate consummation of the merger, the majority stating (R. 1706):

> "If a temporary injunction would imperil or even seriously delay NH's inclusion, this would indeed weigh most heavily against it. We find no likelihood of a delay. . . . It is unrealistic to suppose that inclusion of NH in the Transportation Company can be accomplished before conclusion of the Commission's reconsideration in this case; indeed, the very fair presentation made on behalf of the NH Trustees admitted as much.

But this rejection of the Commission's critical finding in turn presented a dilemma to the majority of the court below, for it could not and in fact did not rely on any of the other reasons given by the Commission for permitting immediate consummation of the merger. With respect to the implied uncertainty of the "applicants' financial situation" referred to by the Commission in its discussion concerning "Time of consummation", Penn-

Central's combined consolidated net income had increased from $4,745,002 in 1961 (the year preceding filing of the merger application) to $122,469,097 in 1965, this in the face of competition with the recently consolidated Norfolk & Western system and Chesapeake & Ohio - Baltimore & Ohio system.

The other reason given by the Commission for refusing to defer consummation until after further hearings and findings was that if consummation "is deferred several years or indefinitely, we can have no assurance that it will ever occur." The further hearing and report and order of the Commission thereon obviously would not require deferral of consummation for "several years or indefinitely". Moreover, consummation of other pending railroad mergers and consolidations, approved by the Commission long before the Penn-Central merger, have been and still are deferred, notably the Missouri Pacific - Chicago & Eastern Illinois consolidation (F.D. No. 21755, decided February 16, 1965, not yet reported) and *Seaboard Air Line - Merger - Atlantic Coast Line*, 320 I.C.C. 122, decided December 2, 1963. Yet no one has contended that those consolidations, if and when upheld by the courts, will not be consummated. Moreover, the stockholders of the Pennsylvania and the New York Central as recently as July, 1966 reaffirmed their support of the merger of the Pennsylvania and the New York Central (R. 966).

The majority of the court below, thus compelled to look elsewhere for grounds for upholding the Commission's action, relied upon general findings made by the Commission in its original report to the effect that the merger, *as then conditioned*, was in the public interest, because of the savings and improvements in service it would generate. These general findings are inadequate support for the Commission's order, for they do not deal with the impact of the combination of the merger and the community of interests between the merged company and the protected carriers on the traffic and revenues of the unprotected carriers.

The majority below clearly violated the basic and fundamental tenet that administrative action must be upheld, if at all, only on the grounds advanced by the agency. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962); *Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194, 197 (1947).

VII

The Court Below Erred in Assuming That the Commission Can Prescribe Effective Traffic Protective Conditions at Some Future Time.

The theory of the Examiners with respect to the competitive aspects of the merger was that the adverse effects on other carriers would be offset by the competitive incentive the merger would afford them to cooperate among themselves in the movement of traffic. The Commission adopted the Examiners' findings in this respect (327 I.C.C. at 481-482).

Yet, by committing itself to the prescription of indemnity arrangements, the Commission has precluded the possibility that the protected carriers will cooperate with the unprotected carriers. Such indemnity arrangements would directly affect the existing relationship between the unprotected C&EI and the protected Erie-Lackawanna, which the Commission found is one of the C&EI's major connections to the East and which would have an overwhelming incentive to route traffic beyond Chicago via the merged company. The indemnity conditions would also affect traffic in which the C&EI now participates with the Delaware & Hudson and the Boston & Maine, for they would have a strong incentive to route traffic beyond their lines via the merged company rather than via routes in which the C&EI participates with other carriers.

The Commission has not said that it can generate the desired cooperative arrangements after further hearing

and, in view of its commitment to the prescription of indemnity conditions, it seems rather clear that it cannot do so. The Commission cannot order the cooperation it had predicted and relied on, and the incentives inherent in the indemnity arrangements will compel the merged company and the protected carriers to cooperate with each other in the routing of traffic, to the detriment of the unprotected carriers.

In the absence of any indication by the Commission that it can resolve the perplexing problems presented by the indemnity conditions, the best that the majority below could say was that in the Commission's report and order on further hearing, "We *may* find provisions carefully tailored to prevent or at least minimize the feared manipulation or, conceivably, financial provisions of an entirely different character . . ." (R. 1710) (Emphasis supplied). The implied assumption of the majority, in permitting consummation of the merger, that the Commission can satisfactorily resolve these many weighty problems clearly was unwarranted. The majority even went so far as to assume that the new conditions to be prescribed by the Commission, even if they were *entirely* new, would be upheld by the courts (R. 1721, 1730, footnote 13).

VIII

The Court Below Erred in Holding That a Reviewing Court Can, After Consummation of the Penn-Central Merger, Order the Commission To Prescribe Effective Conditions for the Protection of Other Carriers.

The Penn-Central merger, as conditioned, will adversely affect the unprotected carriers, and possibly the protected carriers, during the period between consummation of the merger and such time as the Commission may devise (if it can) effective protective conditions. The right of an injured carrier to judicial review after such consummation amounts to no more than a right to continue

to subject itself to injury, with the merged company as the beneficiary of such injury.

The majority of the court below failed to recognize the inevitability of such injury during this interim period. However, the court did deal with the question whether judicial review after consummation of the merger could be adequate and effective in the period following such review. The court unanimously was of the view that dissolution is not in the realm of reality. However, the majority expressed the novel view that a reviewing court could "if it should deem these contentions to be well founded . . . require appropriate change" and "could inform the Commission in a way it would thoroughly understand, precisely what conditions the reviewing court felt should be imposed" (R. 1720-1721).

The view of the majority is clearly contrary to well-established principles. This Court made it abundantly clear in *Federal Power Commission v. Idaho Power Company*, 344 U.S. 17, 20 (1952), that once a reviewing court "lay bare" an error of law, its function was completed.

IX.

The Court Below Erred in Holding the Balance of Equities To Be in Favor of Consummation Because Plaintiffs in the Court Below Did Not Agree To Waive Final Review of the Conditions To Be Prescribed by the Commission on Further Hearing.

The majority of the court below estimated that the Commission's report and order on further hearing "can surely be entered by the Spring of 1967" (R. 1717), while exercise of "plaintiffs' . . . statutory right to come to us and to appeal to the Supreme Court . . ." would entail delay "to the end of 1967" (R. 1717). Because it was dealing with "different periods of time," the majority held the balance of equities to be in favor of immediate consummation of the merger.

Implicit in the foregoing estimates is the majority's belief that appellant will seek judicial review of the Commission's report and order on further hearing, but that Pennsylvania and New York Central will not. The latter two carriers have agreed to forego judicial review of most, but not all, of the conditions to be prescribed after further hearing, while appellant has not so agreed. If penalties of the type here imposed can be considered to be even peripherally within the powers of a reviewing court, the right to judicial review is indeed meaningless.

The majority below also felt that "the long delay to which the applicants have already been subjected argues strongly in favor of letting them get ahead with the job . . ." (R. 1705).

Penn-Central's application for authority to merge was filed in 1962; Missouri Pacific's application for authority to acquire control of appellant C&EI was filed in 1961[15]; and the Seaboard Air Line and Atlantic Coast Line application for authority to merge was filed in 1960[16]. The latter two applications have been approved, with no further hearings to be held unless the Commission's orders therein are set aside, but consummation of those transactions has been stayed pending review by this Court.[17] On the other hand a final order has not yet been entered in the Penn-Central merger proceeding; hearings are being held on substantial and strongly controverted issues; yet the court below has permitted the merger to be consummated. It also has referred to a "delay" of shorter duration than those involved in the Missouri Pacific -

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[15] Missouri Pacific Railroad Company - Control - Chicago & Eastern Illinois Railroad Company, F.D. No. 21755, not yet reported.

[16] Seaboard Air Line Railroad Company - Merger - Atlantic Coast Line Railroad Company, 320 I.C.C. 122.

[17] Illinois Central Railroad Company v. United States, et al., No. 687, October Term, 1966.

C&EI and Seaboard Air Line - Atlantic Coast Line consolidations.

The Penn-Central merger is one between two large and highly prosperous railroads (*ante*, page 38). On the other hand, Appellant C&EI, whose affiliation with Missouri Pacific has been stayed, was described by the Commission in 1965 as "a relatively small, financially weak, and physically deficient railroad" unable "to successfully compete with the relatively large, well equipped, vigorous, long line railroads operating in the same territory . . .". (*Missouri Pacific - Control - Chicago & Eastern Illinois Railroad Company*, F.D. No. 21755 (decided February 16, 1965, not yet reported). No attempt was made in the Penn-Central merger proceeding to rebut these findings. Yet the C&EI is left unprotected not only against the impact of the merger itself but also against the impact of the simultaneously created community of interests between the merged company and the protected carriers.

No railroad merger of any size has ever been permitted to be consummated prior to judicial review. Cf. *Minneapolis and St. Louis Railway v. United States*, 165 F. Supp. 893, 901 (D. Minn., 1958), aff'd, 361 U.S. 1739 (1959); *Canadian Pacific Railway v. United States*, 158 F. Supp. 248, 251 (D. Minn., 1958); *City of Nashville v. United States*, 155 F. Supp. 98, 100 (M.D. Tenn.), aff'd, 355 U.S. 63 (1957); *Florida East Coast Railway v. United States*, 288 F. Supp. 340, 343 (M.D. Fla. 1964); *Illinois Central Railroad Company v. United States, et al.*, No. 687, October Term, 1966. The reason was succinctly stated in the *Florida East Coast* case, *supra*, as follows (288 F. Supp. 340, 343):

> "The result of not enjoining the order would be to permit the merger to proceed as ordered while its legality is litigated. If these plaintiffs ultimately prevail, the resulting chaos could never be restored to order, the injury to plaintiff and intervening plaintiffs could never be repaired. Such a result is difficult for me to reconcile with a statutory scheme which, as indicated above, would appear to envision

> that interested parties be entitled to seek orderly and effective judicial review of administrative orders."

This Court quite recently took cognizance of the fact that consummation of a merger precludes effective judicial review of its merits in upholding the power of courts to grant preliminary injunctions against mergers challenged by the Federal Trade Commission under Section 7 of the Clayton Act (15 U.S.C. Section 15). This Court stated in *Federal Trade Commission v. Dean Foods Company*, 384 U.S. 597, 607 (1966):

> "If consummation of the merger is not restrained, the restoration of Bowman as an effective and viable competitor will obviously be impossible by the time a final order is entered. This is not unusual. Administrative experience shows that the Commission's inability to unscramble merged assets frequently prevents entry of an effective order of divestiture."

It is submitted that the equities overwhelmingly require postponement of the Penn-Central merger until adequate protection can be formulated for the C&EI and other unprotected carriers.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the court below erred in permitting consummation of the Penn-Central merger and simultaneous creation of a traffic and revenue pool and anti-competitive combination of competitors prior to hearing and findings thereon required by Sections 5(1) and 5(2) of the Interstate Commerce Act (49 U.S.C. Sections 5(1) and 5(2)). It is requested that the judgment of the United States Court for the Southern District of New York be reversed, and that this case be remanded to that court with instructions to enter an interlocutory injunction pending final determi-

nation by the Interstate Commerce Commission of the substantial issues pending before it.

Respectfully submitted,

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APPENDIX A

ADMINISTRATIVE PROCEDURE ACT

Section 5, 5 U.S.C. § 1004.

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 1010 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives.

(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of

adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

(c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

Section 8(b), 5 U.S.C. § 1007(b).

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Section 10(c), 10(d), 10(e), 5 U.S.C. §§ 1009(c), 1009(d), 1009(e).

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be

subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise

not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, § 10, 60 Stat. 243.

JUDICIAL CODE

28 U.S.C. § 1253.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 928.

28 U.S.C. § 1336.

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission. June 25, 1948, c. 646, 62 Stat. 931.

28 U.S.C. § 2101(b).

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

28 U.S.C. § 2284.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least

five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a

single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. June 25, 1948, c. 646, 62 Stat. 968; June 11, 1960, Pub. L. 86-507, § 1(19), 74 Stat. 201.

28 U.S.C. § 2321.

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

28 U.S.C. § 2322.

All actions specified in section 2321 of this title shall be brought by or against the United States.

28 U.S.C. § 2323.

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

28 U.S.C. § 2324.

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of its own stay or suspend the operation of the order, but the court may restrain or suspend, in

whole or in part, the operation of the order pending the final hearing and determination of the action.

28 U.S.C. § 2325.

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

INTERSTATE COMMERCE ACT

Sections 5(1), 5(2), 49 U.S.C. §§ 5(1), 5(2).

(1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public

or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further*, That any contract, agreement, or combination to which any common carrier by water subject to chapter 12 of this title is a party relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on September 18, 1940, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a

person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest,

it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion,

and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection

of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Section 5(9), 49 U.S.C. § 5(9).

The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7) of this section, as it may deem necessary or appropriate.

Section 5(11), 49 U.S.C. § 5(11)

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employ-

ees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

APPENDIX B

Discussion by Judge Weinfeld, Dissenting, of Commission's Powers Under Section 5(9) of Interstate Commerce Act.

" The procedure of interim authorization here adopted by the Commission, carried to its logical conclusion, would permit consummation of a merger upon a general finding that a proposed merger is in the public interest, subject to terms and conditions to be reserved for future determination. The terms and conditions upon which a merger is contingent in order to satisfy the public interest go to the very validity of the merger. The statute, which provides that the Commission "shall enter an order approving and authorizing such transaction, upon terms and conditions, and with the modifications so found to be just and reasonable," gives support to the plaintiffs' view that protective terms for the three carriers, found essential to validate this merger, must be spelled out by the Commission before and not after it authorizes consummation.

This is not to say that once a valid order in compliance with the statute is entered the Commission does

not have power to retain jurisdiction thereunder or under other statutory provisions to make modifications necessary in the light of subsequent changed circumstances, or to assure compliance with terms and conditions previously imposed or to correct technical or clerical errors.

Whatever express or implied powers the Commission possesses with respect to modifying, supplementing or reconsidering the terms of an issued order presuppose that the original order is valid. An originally invalid order should not be upheld on the ground that it may be validated by subsequent section 5(9) orders.[22]

Further, while it is true that under section 5(9) the Commission has the power to "from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2) or (7) of this section, as it may deem necessary or appropriate," the Commission's power under this section has been narrowly confined. Thus under 5(9) it has power to modify or supplement the terms of an order if there has occurred a material change of conditions,[23] or if the applicant fails to abide by material representations made in the application upon which the order is based.[24]

It is true also that the Commission has certain other limited powers to modify an effective order. But

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[22]See CAB v. Delta Air Lines, Inc., 367 U.S. 316, 328 (1961). ". . . [T]he power to reconsider . . . [is not] the lever for 'nullify[ing] an express provision of the Act.' "

[23]City of New Orleans v. Texas & N.O.R. Co., 195 F. 2d 882, 886 (1952); City of New Orleans v. Texas & Pac. Ry. 195 F. 2d 887, 889 (1952).

[24]Baggett Transp. Co. v. United States, 206 F. Supp. 835, 842 (N.D. Ala. 1962).

the authorities relied upon by the majority are not as broad as suggested. Thus, in United States v. Rock Island Motor Transit Co.,[25] cited approvingly in American Trucking Ass'ns, Inc. v. United States,[26] the Supreme Court held that the Commission has implied power to reserve jurisdiction to make further limitations, restrictions or modifications in order to insure that the motor service of a railway controlled motor carrier remains supplemental or auxiliary to the train service of the railway. The National Transportation Policy[27] and the specific policy commitment embodied in the proviso to 5(2)(b) (unrelated to the type of merger here involved)[28] were held to give rise to such an implied power; the source and scope of the power implied were thus severely limited. Indeed, as the Supreme Court has since observed:

> ". . . [T]he Court in Rock Island was very careful to limit its holding to the particular modification made in that case."[29]

In addition, neither *Rock Island* nor *American Trucking Ass'ns* involved the question whether the Commission has power to postpone the determination

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[25] 340 U.S. 419 (1951).

[26] 355 U.S. 141, 154 (1957).

[27] 54 Stat. 899.

[28] "*Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." 54 Stat. 906, 49 U.S.C. § 5(2)(b).

[29] CAB v. Delta Air Lines, Inc., 367 U.S. 316, 333 (1961).

of terms and conditions upon the sole ground that it wishes to expedite the effective date of its order.[30] *Rock Island* involved a challenge not to the validity of an original order but to the Commission's power to supplement an originally uncontested order by an "additional requirement,"[31] in order to "insure that the service *remains* auxiliary or supplemental . . . to insure that the operations *will continue* as auxiliary or supplemental to the train service."[32] [emphasis supplied.] And *American Trucking Ass'ns* involved a reservation of jurisdiction to impose the same sort of conditions if required "by reason of material changes in conditions or circumstances. . . ."[33] The power asserted by the Commission in the instant case cannot be justified as necessary to insure future compliance with already promulgated terms and conditions, or to provide for changing circumstances.

Finally, it is true that in American Trucking Ass'ns, Inc. v. Frisco Transp. Co.,[34] also relied on by the majority, the Commission was held to have the power under section 17(3) of the Act to correct clerical errors in a certificate of public convenience after its issuance.[35] But that case, which, as the Supreme Court found, concerned "the correction of inadvertent ministerial

[30] These cases cannot be said to apply a fortiori, as the majority suggests, on the ground that "here [the] carrier will have consented" to the reservation of power to impose conditions. Acceptance by the respective carriers in the *Rock Island* and the *American Trucking Ass'ns* cases of the certificate with its reservation clauses in effect constituted consent.

[31] 340 U.S. 419, 443 (1951).

[32] *Id.* at 435.

[33] 355 U.S. 141, 154 (1957).

[34] 358 U.S. 133 (1958).

[35] *Id.* at 144-46.

errors,"[36] seems to me not germane to the issue here presented; indeed, all cases cited by the majority serve to put in proper focus the extraordinary nature of the power here contended for.

On the other hand, in United States v. Seatrain Lines, Inc.,[37] it was held that the Commission, notwithstanding a purported reservation in the certificate,[38] has no power to change or supplement terms originally imposed because it has changed its policy.

Undoubtedly, mergers such as this present many intricate, difficult and challenging problems which cannot be resolved at once. Acknowledging the heavy burdens and the great responsibility which the Commission bears in passing upon them, and however desirable it is to expedite a merger to carry out the National Transportation Policy, the Commission's action must be taken within the framework of the statutory command and not by shortcuts which may impinge upon the rights of parties and the interest of the public.

> "[T]he fact is that the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do, but

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[36] Id. at 145.

[37] 329 U.S. 424 (1947). In connection with the *Seatrain* case, the Supreme Court has observed; ". . . both administrative and judicial feelings have been opposed to the proposition that the agencies may expand their powers of reconsideration without a solid foundation in the language of the statute." CAB v. Delta Air Lines, Inc., 367 U.S. 316, 334 (1961).

[38] The certificate contained a provision that it was subject "to such terms, conditions, and limitations as are now, *or may hereafter be*, attached to the exercise of such authority by this commission." [emphasis supplied] 329 U.S. 424, 427 (1947).

what Congress has said it can do. . . . [T]o the extent there are uncertainties over the Board's power to alter effective certificates . . . , the specific instructions set out in the statute should not be modified by resort to such generalities as 'administrative flexibility' and 'implied powers'."[39]

[39] CAB v. Delta Air Lines, Inc., 367 U.S. 316, 322-23 (1961).